

In re Petersen

Case No. 386-02013-H13

8-6-1991

Petersen v. Isaak et al #86-0601-H

The court held that a pre petition foreclosure sale was for less than a reasonably equivalent value under §548 where the bid at the foreclosure sale was about 1/3 of the fair market value of the property. The court set the sale aside and ordered the property re-sold for the benefit of the estate.

P91-29(7)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re

RITA HELEN PETERSEN

Debtor.

Case No. 386-02013-H13

RITA HELEN PETERSEN,

Plaintiff,

Adversary Proceeding
No. 86-0601-H

v.

ROY NEWMAN, CHARLES N. ISAAK,
FRANCIS ROBERT PETERSEN, ROBERT
McSWEENEY,

Defendants.

MEMORANDUM OPINION

AND RALPH BOLLIGER,

Defendant and
Third Party Plaintiff,

v.

ROBERT W. MYERS, TRUSTEE,

Third Party Defendant.

This adversary proceeding was filed by the debtor November
15, 1986. The complaint to set aside the sale was combined in

1 - MEMORANDUM OPINION

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1 one document containing motions to set aside liens on her
2 homestead under 11 U.S.C. §522(f), for leave to borrow money to
3 redeem the property from a sheriff's sale following a mortgage
4 foreclosure on March 23, 1986, and other relief.

5 Her complaint sought to have the sale set aside for
6 violation of the 11 U.S.C. §362 stay because the confirmation
7 of sale order on May 1, 1986 by the state court was not issued
8 until after her Chapter 13 filing, which filing was on April
9 22, 1986.

10 In her complaint, she also sought to have the foreclosure
11 sale set aside under 11 U.S.C. §548 for the reason that the
12 transfer was for less than a reasonably equivalent value to the
13 defendant, Roy Newman.

14 At the hearing on the motions based on the facts presented
15 at the hearing, the court entered its Memorandum Opinion on
16 February 6, 1987 allowing the debtor to obtain credit under 11
17 U.S.C. §364(d) to redeem the residence, which had been sold at
18 foreclosure sale to Newman for \$19,850.

19 One Charles N. Isaak held a judicial lien based upon a
20 judgment he had obtained for attorney fees due him from the
21 debtor. He had assigned the judgment to Bonded Credit Co.
22 operated by Newman. When the mortgage foreclosure sale came to
23 Isaak's attention, he borrowed money and provided it to Newman
24 to make the purchase at the sale. Isaak is an attorney.
25 Bonded Credit and Newman were represented by an attorney, Brian
26 W. O'Brien who had been identified in the state court

1 foreclosure proceedings as also attorney of record for Isaak in
2 a document filed March 26, 1986 signed by both Isaak and
3 O'Brien.

4 O'Brien and Isaak later became antagonists as to their
5 respective roles. Isaak appeared in the instant proceedings to
6 assert his interest as a creditor of the debtor. He sought
7 relief against Newman and O'Brien also, which the court
8 rejected as not germane to the issues raised in plaintiff's
9 complaint.

10 The court in the February 6, 1987 memorandum, again on the
11 facts presented at the hearing, avoided the lien of Isaak under
12 11 U.S.C. §522(f). No appeal was taken from that order, and
13 time for reconsideration has long since passed. It is the
14 court's opinion that Judge Hess' order is therefore the law of
15 the case and final. What relief Isaak may be entitled to, if
16 any, against others outside bankruptcy is not before the court.

17 After the leave to obtain credit, an attorney, Ralph
18 Bolliger, loaned \$22,000 to the debtor to redeem the property
19 and pay real estate taxes. This was pursuant to the Memorandum
20 Opinion and a Declaratory Judgment and Order which provided
21 that the lender should have priority over liens of the debtor's
22 former spouse and one McSweeney.

23 Thereafter the case and proceedings became a procedural
24 enigma. The State of Oregon Legislature had after the date of
25 the mortgage reduced redemption rights from one year to 180
26 days.

3 - MEMORANDUM OPINION

1 When the debtor sought to redeem the purchaser refused the
2 redemption funds. The plaintiff debtor persuaded the state
3 court to issue the certificate of redemption and that court
4 ordered the \$22,000 paid to the bankruptcy Chapter 13 trustee.
5 Newman obtained relief from the stay of 11 U.S.C. §362 to
6 appeal the state court order. The Oregon Court of Appeals
7 overruled the trial court on the basis that the statutory time
8 reduction was constitutionally applicable to this sale, and
9 that therefore the redemption should fail. That ruling was
10 appealed to the State Supreme Court which held that the Court
11 of Appeals should not have reached the constitutional issue
12 because the redemption procedure was otherwise flawed, causing
13 the same result.

14 Thus it is the law of the case, again, that the debtor
15 cannot redeem the property, and the borrowed funds are still in
16 the hands of the trustee. The lender Bolliger has been allowed
17 to, and has, intervened in these proceedings.

18 Trial of these proceedings was therefore held pursuant to
19 a pre-trial order in which the parties joined, although Isaak
20 is not a signatory.

21 The plaintiff and Bolliger urge that the property was
22 worth at the time of the sale, the time of the debtor's Chapter
23 13 filing and presently approximately three times the price
24 paid, and that the sale should be set aside, and the property
25 sold to satisfy Bolliger's mortgage, provide \$15,000 exemption
26 proceeds to the debtor, and provide a dividend to creditors if

1 after administrative costs, funds remain.

2 The court heard the testimony of expert witnesses, the
3 debtor and other witnesses and is convinced that the sale was
4 for less than reasonably equivalent value.

5 As noted in In re Lampkin, 116 BR 450 (Bkcty. D. Md.
6 1990), the cases are split on whether the violation of the stay
7 of 11 U.S.C. §362 (the other thrust of the plaintiff) makes the
8 stay void or voidable. Relief may be granted to the violator
9 under §§ 11 U.S.C. §549(c) and §542(c) under appropriate
10 circumstances. Also there exists power to annul the stay. 11
11 U.S.C. §362(d). See In re Albany Partners, Ltd., 749 F2d 670
12 (11 cir 1984).

13 While continuing to urge that the sale was in violation of
14 the stay, the debtor proceeded with conduct indicating waiver
15 of that position by seeking the certificate of redemption and
16 leave to obtain credit to redeem and other conduct.

17 These treatments of the confirmation of sale order are
18 consistent with waiver or de facto annulment of the stay.

19 However, the validity of the confirmation of sale after
20 the Chapter 13 filing need not be determined because of this
21 court's ruling on the plaintiff's alternate theory that the
22 sale should be set aside as having been made for an
23 unreasonable equivalent value and voidable under 11 U.S.C.
24 §548.

25 This is an appropriate inquiry. See In re Taylor, 884 F2d
26 478 at 486 (9th Cir 1989).

1 While there is some authority for the proposition that a
2 non-collusive regularly conducted sale precludes consideration
3 of other values and cannot ordinarily be challenged ((see In re
4 Madrid, 21 BR 424 BAP 9th Cir 1982)), this court is persuaded
5 that the thorough analysis by the court in In re Lindsay, 98 BR
6 983 (Bkctcy. S.D. Cal. 1989) is appropriately applied to these
7 proceedings.

8 There was testimony that the property was sold with no
9 attempt to get the best price possible, but only to cover the
10 mortgage to the State Department of Veterans' Affairs, and that
11 only the minimum statutory notice requirements were met, and
12 the price was far below the reasonably equivalent value of the
13 property. The sale should be set aside.

14 Both the intervenor and the plaintiff agree that the
15 property should be sold and that distribution of the proceeds
16 should be ordered by the court.

17 After the foreclosure sale Newman received rent from the
18 plaintiff during the Chapter 13. Plaintiff had to leave the
19 property for medical reasons, and somehow Bolliger took over
20 management and paid expenses and received rentals.

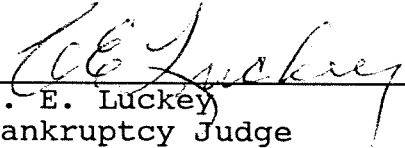
21 Until the sale proceeds are known, and an analysis of
22 payments to Newman and to Bolliger is made, an order for
23 distribution cannot be framed.

24 Therefore, consistent herewith a separate order will be
25 entered that the sale be set aside, that the sale of the
26 property be listed with a multiple listing agency, that sale be

1 subject to confirmation by the court, and that the proceeds be
2 tendered to the Chapter 13 trustee subject to further order of
3 the court for distribution.

4 This opinion contains the court's Findings of Fact and
5 Conclusions of Law and pursuant to Bankruptcy Rule 7052 they
6 will not be separately stated.

7 DATED this 6 day of August, 1991.

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9 C. E. Luckey
10 Bankruptcy Judge
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21 cc: Ralph Bolliger
22 Bruce Orr
23 Magar Magar
24 Charles Isaak
25 Brian O'Brien
26 Robert W. Myers, Trustee